Office-Supreme Court, U.S.
FILED
JUN 9 1981
ALEXANDER L. STEVAS,
CLERK

80-2077

NO. 81 —

In The Supreme Court of the United States

OCTOBER TERM 1980

WILLIAM LEEKE, individually and in his official capacity as Director of the South Carolina Department of Corrections; PETER THEM, individually and in his official capacity as legal advisor to the South Carolina Department of Corrections,

Petitioners,

vs.

MELVIN LEE TIMMERMAN, and ROBERT THOMAS, individually and on behalf of all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Whether respondents as prison inmates have a constitutional right of access to the criminal courts of South Carolina to seek from a magistrate arrest warrants charging prison guards with criminal conduct.

2. Whether in 1973, it was clearly established that respondents had a constitutional right of access to the criminal courts of South Carolina to seek from a magistrate arrest warrants charging prison guards with criminal conduct, and that petitioners Leeke and Them knew or should have known of this right.

3. Whether respondents as prison inmates have private rights or interests in the criminal prosecution of prison guards sufficient to give them standing to sue for enforcement of these rights.

4. Whether the state's prosecuting attorney's request to the Magistrate that pursuant to his prosecution policy cross-warrants should not issue against prison guards until an investigation by the South Carolina Law Enforcement Division could be conducted unconstitutionally interfered with respondents' right to seek arrest warrants.

5. Whether petitioner Leeke's acquiescence in the face of knowledge that actions had been taken by others to deny respondents their right to seek criminal arrest warrants is sufficient basis to impose upon him monetary liability pursuant to 42 U.S.C. 1983.

6. Whether the solicitor's prosecution policy that cross-warrants sought by respondents should not issue against prison guards until an investigation by the South Carolina Law Enforcement Division could be conducted, unconstitutionally denied respondents equal access to the courts.

II.

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III.

OPINIONS BELOW

The order of the United States Court of Appeals for the Fourth Circuit denying petition for rehearing and refusing suggestion for rehearing en banc, filed March 11, 1981, is unreported and is appended hereto at 59.

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the District of South Carolina, filed December 30, 1980, is unreported and is appended hereto at 21.

The order of the United States District Court for the District of South Carolina denying petitioners' motion for reconsideration entered October 23, 1979, is unreported and is appended hereto at 44.

The opinion of the United States District Court for the District of South Carolina awarding respondents' monetary relief, filed September 28, 1978, is unpublished and appended hereto at 24.

The opinion of the United States Court of Appeals for the Fourth Circuit reversing the decision of the district court is reported at 528 F.2d 811 (4th Cir. 1975) and is appended hereto at 46.

IV.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was filed December 30, 1980. By order filed March 11, 1981, petition for rehearing and suggestion for rehearing en banc was denied.

This Court has jurisdiction to review the opinion rendered below pursuant to the provisions of 28 U.S.C. §1254(1).

V.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of Amendment XIV of the United States Constitution:

> All persons born or naturalized in the United States States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 42 U.S.C. 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

VI.

STATEMENT OF THE CASE

This suit arose pursuant to 42 U.S.C. §§1983 and 1985, with jurisdiction founded upon 28 U.S.C. 1343.

On April 9, 1974, respondents commenced a civil action in the District Court for the District of South Carolina. Petitioners William Leeke, Commissioner of the

State Department of Corrections, and Peter Them, who is presently an attorney in private practice but at the time of the incident employed by the Department of Corrections and was not licensed as an attorney, were named defendants in respondents' action. Additional defendants included prison guards and officials, Magistrate Franchot Brown, and John Foard, the former prosecuting attorney for Richland County, South Carolina.[1]

The respondents sought injunctive relief, including an order enjoining pending state court criminal prosecutions of respondents, and an order enjoining all named defendants [except Magistrate Brown] from interfering with the issuance or non-issuance of arrest warrants sought by respondents. Additionally, respondents sought a declaration that the policy of the solicitor with reference to the issuance of criminal warrants sought by inmates violated the Fourteenth Amendment of the United States Constitution. Finally, respondents requested an award of monetary damages.

On April 18, 1974, Magistrate Brown and then Solicitor Foard moved the district court for dismissal on the basis of judicial and prosecutorial immunity respectively. The district court granted the motion in an order dated July 15, 1974. Appeal was taken and the United States Court of Appeals for the Fourth Circuit, in an opinion dated December 18, 1975, reversed and remanded for further proceedings consistent with its opinion. *Timmerman v. Brown*, 528 F.2d 811 (4th Cir. 1975).

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[1]Petitioners were sole appellants in the appeal to the Fourth Circuit Court of Appeals which resulted in that Court's unpublished opinion entered December 30, 1980. All other respondents were dismissed by the district court in its unpublished opinion entered September 28, 1978 and are not parties to this petition.

On May 5, 1976, the district court temporarily enjoined the state of South Carolina from prosecuting respondents. The district court conducted hearings on May 20 and May 25, 1976, on whether the state should be enjoined from prosecuting respondents. The court determined that the prosecution of respondents could proceed.[2] During the course of the hearings on the injunction, the court found that petitioners had interfered with respondents' right to seek criminal arrest warrants. On June 2, 1976, the court heard testimony on the issue of damages.

The district court issued its final order filed September 28, 1978, awarding monetary relief to respondents against petitioners in the amount of $3,000 and an additional award against petitioner Them for $1,000 in punitive damages. All other defendants were dismissed from the suit.

The district court found that a melee occurred at Central Correctional Institute in Columbia, South Carolina in August, 1973, involving prison guards and inmates. As a result respondents contacted Magistrate Brown to procure arrest warrants against certain guards.

The court found that petitioner Them met with Richland County Sheriff Frank Powell, Deputy Attorney General J. C. Coleman, and Solicitor Foard, each of whom suggested possible courses of action available to stop the criminal prosecutions of the guards. Solicitor Foard wrote a letter to Magistrate Brown requesting that criminal warrants not issue until an investigation by the South Carolina Law Enforcement Division could be conducted and stating the solicitor's policy on prosecution of cross-warrants by inmates.

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[2]Respondent Timmerman was found not guilty and respondent Thomas was convicted on two counts of assault and battery.

The court further found that petitioner Leeke did not participate in the meetings with law enforcement officials, did not authorize the meetings and was unaware of the activity until the events had already taken place. The court, however, found that Leeke had supervisory control over petitioner Them. Leeke, it was found, relied heavily upon the Solicitor's Office and the Attorney General's Office for legal advice.

The district court concluded that there existed a clearly established constitutional right of access to the courts to seek arrest warrants in 1973, and that Solicitor Foard's letter to Magistrate Brown interfered with that right. The court concluded that petitioners knew or should have known of this clearly established constitutional right in 1973, and that their conduct interfered with respondents' exercise of that right. The court further concluded that Them acted with a "malicious intention", defining the phrase as "simply intending to deprive someone of his rights." Leeke's conduct was described as that of "acquiescence".

A motion to reopen or amend the judgment was filed in the district court by petitioners, and was denied by order of the court dated October 23, 1979. Petitioners appealed the district court's order to the United States Court of Appeals for the Fourth Circuit. In a per curiam opinion, entered December 30, 1980, and unpublished, a three judge panel of that court affirmed the district court's decision for ". . . reasons adequately stated by the district court."

Petition for rehearing and suggestion for rehearing en banc was filed with the Fourth Circuit by petitioners. The three judge panel denied the petition without poll of the court in an order entered March 11, 1981, and unreported.

VII.

REASONS FOR GRANTING WRIT

In this decision, the court of appeals has effectively declared unconstitutional the widespread practice employed by the federal government and numerous states with respect to criminal prosecutions — that of permitting the jurisdiction's prosecuting authority to provide input into the important prosecution decision whether an arrest warrant should be issued. Such a ruling undermines this Court's clearly defined and limited decisions concerning the constitutional right of "access to the courts". By employing these decisions in a completely inappropriate setting, the court of appeals has created an entirely new constitutional right, certainly never before suggested by this Court — the private citizen's "right" of "access to the courts" to seek an arrest warrant against another individual. The impact of the Fourth Circuit's ruling upon the effective operation of federal and state criminal systems and the decisions of this Court is enormous.[3] Thus, the writ of certiorari should be granted so that the constitutional questions presented herein may be settled by this Court.

First, the decision involves a question of paramount constitutional significance to an effective system of criminal prosecution in this country. If allowed to stand, the decision would undoubtedly jeopardize a basic objective of nearly all American criminal law systems, including that of the federal government — the placement of control over criminal prosecutions under governmental authority. Virtually every jurisdiction has determined it

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[3]While the monetary judgment was assessed against petitioners, the unconstitutional conduct found by the court was the prosecuting attorney's request to the magistrate that the warrants not issue pending investigation.

vital to an effective system of criminal prosecution that there be a single prosecuting authority acting on behalf of the government and under governmental control. A number of states, as well as the federal government, now affirmatively require the government's prosecuting authority, not the private citizen, to control the prosecution from the very outset, by determining which criminal complaints may be filed with the magistrate. Many others do not prohibit the public prosecutor's having input in the decision. Now, simply by constitutional fiat, and in the name of "access to the courts" the Fourth Circuit has attempted to substitute its own views and return control over criminal prosecutions to private citizens, where certainly the potential for abuse and chaos is great. *State ex rel. Wild v. Otis,* 251 N.W.2d 361, cert. den., 434 U.S. 1003 (1978).

Secondly, the ruling below is in sharp conflict with the applicable decisions of this Court. It undermines, if it does not completely eliminate, this Court's holding in *Linda R. S. v. Richard D.,* 410 U.S. 614, as it applies to the arrest stage of prosecution. Moreover, the ruling extends both the *Boddie v. Connecticut,* 410 U.S. 371 (1971), and *Bounds v. Smith,* 430 U.S. 817 (1977), lines of cases involving access to the courts in the area of an individual's seeking a criminal prosecution, a setting which is entirely inappropriate for the existence of private, much less constitutional rights. Moreover, this court has never even suggested that the constitutional right of access to the courts might be applicable in this area.

Thirdly, this decision severely undermines this Court's decisions in the area of personal liability of public officials under 42 U.S.C. §1983. By imposing monetary damages, the burden of the Fourth Circuit's creation of this heretofore unarticulated and sweeping constitutional right is placed upon public officials who had no basis whatever for knowing of the existence of such a

constitutional right of access to the courts to seek an arrest warrant. Thus, this Court's standard of good faith immunity under §1983, as articulated in *Procunier v. Navarette*, 434 U.S. 555 (1978), has been eviscerated and a new standard of absolute liability substituted. Moreover, the Court's conclusion that a mere "improper acquiescence" to what it deemed an unconstitutional plan of activity which "could have been aborted" is precisely the type of personal liability against public officials which this Court sought to preclude in *Rizzo v. Goode*, 423 U.S. 362 (1976).

A.

The Decision of the Court of Appeals Severely Undermines the Prosecution Policies of Numerous Jurisdictions Throughout the United States.

The Fourth Circuit has in effect now told the states and the federal government that they are constitutionally prohibited from allowing their prosecuting authorities a voice in the decision whether a prosecution goes forward at the complaint or arrest warrant stage. Under this decision, the public prosecutor is now precluded from suggesting, recommending, requesting, or determining that the magistrate not file a criminal complaint or issue an arrest warrant sought by a private complainant. Regardless of how well founded the policy reasons underlying the prosecutor's judgment, his mere request to the magistrate that a warrant not be issued would constitute an "interference" with the complainant's constitutional right of "access to the courts." If the Court allows such a holding to stand, it would abolish the well conceived policy of prosecution observed by most states and by the federal government. These jurisdictions have properly concluded, as part of the basic principle that private citizens possess no individual "rights" in criminal prosecutions, it is appropriate for the jurisdiction's prosecuting authority to possess a voice in what criminal

complaints are filed and which of those complaints result in the issuance of arrest warrants.[4]

[4]South Carolina is no exception. To petitioners' knowledge, there exists no provision of South Carolina law, statutory or otherwise, which prohibits the solicitor, South Carolina's prosecuting officer, from recommending to the magistrate that an arrest warrant not issue. In fact, *State v. Addison*, 2 S.C. 356, 363-4, strongly indicates otherwise. There, the South Carolina Supreme Court stated:

> The State is the party to the record charging an offense committed against its "peace and dignity." As it represents the whole people within its territorial limits, in point of fact, each one of them is, more or less, as citizens interested in the issue. In every department of the Government, however, proper persons are by law delegated to represent it. Solicitors are elected and assigned to the several circuits, whose duty it is to prosecute for violation of the public law, with a general supervision over all matters appertaining to this branch of the judicial department. The whole control of the management of all criminal cases is given to them and especially the prosecution for crime, and misdemeanors. If every citizen of the State . . . can assume to interfere with the prosecution in the hands of the Solicitor, it would be impossible to preserve and secure that adherence to form and regularity so necessary and proper in all legal proceedings . . . [I]s it likely that the interest of the State would be promoted by a conflict of opinion between [the Solicitor and private "prosecutor"] in which the Solicitor is to be made to yield to the [private] prosecutor?

It is the recognized practice in South Carolina that the magistrate receive the solicitor's assistance in investigation or his views regarding whether the issuance of an arrest warrant would constitute a futile act in terms of the solicitor's prosecution policy.

In *Timmerman v. Brown*, 528 F.2d 811, (4th Cir. 1975), at fn. 2, the Court noted that in South Carolina, a solicitor may not prevent a magistrate from issuing an arrest warrant. This thought was attributed to a concession made by counsel. However, the court's conclusion erroneously portrays South Carolina's warrant procedure which, as a matter of law, cannot be conceded. Petitioners later explained this misconception concerning South Carolina law to the Fourth Circuit panel at oral argument of that case presently before this Court. In any event, the district court did not consider or attempt to discern state criminal procedure in its final decision of September 28, 1978, nor was it considered by the Fourth Circuit in its opinion of December 30, 1980. Counsel fully believes the correct status of South Carolina

The importance of and necessity for this policy has been effectively stated in the American Bar Association's Project on the Standards for Criminal Justice, *Standards Relating to the Prosecution Function and the Defense Function*, comment to §3.4 (Approved Draft, 1971). There, it was noted that:

> Whatever may have been feasible under conditions of the past, modern conditions require that the authority to commence criminal proceedings be vested in a professional, trained, responsible public official.

Under the heading "Citizen Complaints", the comments further observe:

> There are sound reasons of general policy for the joint screening of cases by both the prosecutor and the magistrate. The prosecutor brings trial perspective of his public responsibility to bear on the decision . . . Where a magistrate has power to issue a warrant on the complaint of a citizen, it is desirable that a public prosecutor either endorse his approval or be afforded a means of recording his reasons for declining prosecution.

The A.B.A. study concludes that:

> Closely related to this is the question of what role the prosecutor should have in the issurance of arrest warrants. Some jurisdictions by statute require the approval of the prosecutor before an arrest warrant may issue . . . It is established federal practice to secure the approval of the United States Attorney before application is made for a warrant . . . In the view of the Advisory Committee the approval or endorsement of the prosecutor should be obtained unless it's not feasible to do so. Generally, circumstances which permit an application for an arrest

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Footnote 4 (continued)

law to be as stated in the preceeding paragraph of this note. *See also*, Code of Laws of South Carolina, §17-1-10 (1976, as amended); *State v. Addis*, 257 S.C. 482, 487, 186 S.E.2d 401 [The Solicitor "must and does have full control of the state's case".]

warrant to be made will also permit time to consult with the prosecutor and to obtain his approval.

See also, Lafave, *Arrest: The Decision to Take a Suspect Into Custody,* at 34-35.

This policy is widely recognized and approved in the United States. For example, in *U.S. ex rel. Savage v. Arnold,* 403 F. Supp. 122 (E.D. Pa. 1975), the court relied upon Professor Moore's earlier interpretation of Rule 3 of the Federal Rules of Criminal Procedure, in holding that a prisoner possessed no "right" to file a criminal complaint.

> Although a private citizen is not barred by the Rules from instituting a complaint before the magistrate he may not do so as a matter of right . . .
>
> The broader issue which this presents is the scope of the government's control over the prosecution of crime.

Supra, at 174. Similarly, in *People v. Muka,* 440 F. Supp. 33, 37 (N.D. N.Y. 1977), the court succinctly stated:

> What defendant Muka seems to misapprehend is that a criminal prosecution is brought on behalf of the United States as whole, rather than to vindicate private rights, a purpose better suited by the bringing of a civil action.

See also, United States v. Panza, 381 F. Supp. 1133 (W.D. Pa. 1974); *Dixon v. Md.,* 261 F. Supp. 746 (D. Md. 1966); *U.S. v. Bryson,* 434 F. Supp. 986 (W.D. Okla. 1977); *United States ex rel. Pope v. Bruckno,* 330 F. Supp. 793 (E.D. Pa. 1971). Just as the A.B.A. study, none of these numerous federal decisions so much as hinted that this legitimate prosecutorial "interference" posed any constitutional problem whatever.

Likewise, many states have seen fit to adopt some form of the federal model.[5] Wisconsin law, a notable

example, provides that "[a] complaint is issued when it is approved for filing by the district attorney." *See*, §968.02 WIS.STAT.ANN. The comments to this Wisconsin provision state that

> [t]his is a change from the present law designed to give the district attorney a greater voice in the initiation of criminal proceedings. Since his is the obligation of conducting the prosecution, it is believed that he should have a voice in the screening out of unfounded complaints and in determining if there was sufficient evidence to warrant a prosecution.

In *Petition of Piscanio*, Pa., 344 A.2d 658, the constitutionality of the Pennsylvania rule of criminal procedure, which allowed the district attorney to approve the filing of criminal complaints, was attacked. The plaintiff contended he was entitled to a hearing "before the court to support his motion for reinstatement of the complaints." Said the court,

> In this circumstance, no hearing should be available as there is no dispute between the private and public prosecutor and the complainant does not risk the loss of any rights. In bringing his own complaint, he is calling the attention of the attorney for the Commonwealth to an alleged violation of the law, a public wrong done to the people of the Commonwealth. If he fails to convince the public prosecutor in his capacity as representative of the people, or the court . . . to redress what he conceives to be a violation of the law, he has lost nothing.

Supra at 661, n. 5. The court concluded that as private

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[5]*See* e.g., Wash.: West's R C W A Title 10 App.J.Cr. Rule 2.01; Neb.: NEB.REV.STAT. §29-404; S.D.: S.D. CODIFIED LAWS ANN. §23A-2-2; Wis.: WIS.STAT.ANN. §968.02; Vt.: Rule 4 V.R.Cr.P.; Pa.: Rule 133(B) Pa. R.Crim.P.; Ohio: OHIO REV. CODE ANN. §2935.10; Minn.: 49 MINN.STAT. ANN. R.Cr.P. 2.02; Mich.: MICH. COMP. LAWS ANN. §813.

"prosecutor," the citizen, "even as a victim . . . has no legitimate interest other than as a member of the general public in seeing a violator of the laws brought to justice by the Commonwealth and punished for his misdeeds." *Supra.*

This Court has already emphasized its complete concurrence with this view in *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973). There, the mother of an illegitimate child contended that interpretation of a criminal support statute as applicable only to fathers of legitimate children violated the Equal Protection Clause. She sought to enjoin the state prosecutor to enforce the statute against the father of her child.

The Court concluded that the mother possessed no standing to seek prosecution. The plaintiff's failure to secure support payments had not resulted from the nonenforcement of the criminal statute. All that was assured by enforcement was the "jailing of the child's father." Any individual benefit to the mother was "only speculative." *Supra* at 618.

Significantly, the Court concluded that the very nature of the criminal system dictated this result. Private relief or satisfaction was inherently foreclosed, unlike the civil contempt situation where incarceration might provide direct monetary benefit to the plaintiff. Concluded the Court,

> in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.

Supra, at 619. *See also, Imbler v. Pachtman,* 424 U.S. 409, 438, (White J. concurring) ["There is no one to sue the prosecutor for an erroneous decision not to prosecute."]; *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 37 (1976) ["exercise of prosecutorial discretion cannot be challenged by one who is himself neither prosecuted nor threatened with prosecution."]

The present situation is no different from *Linda R. S.* Issuance of arrest warrants at respondents' behest against Central Correctional Institute guards certainly does not serve to vindicate respondents' private interests. To imagine vindication of these interests merely because the guards are arrested is to increase tenfold the type of speculation which *Linda R. S.* sought to preclude and which Article III prohibits.

South Carolina law is identical to *Linda R. S.* The South Carolina Supreme Court in *State v. Addison*, 2 S.C. 356, *supra*, at 364 stated that

> save for the just and proper vindication of the law, no one has an interest in the conviction of [another].

Although as in the federal system, individuals are permitted to file criminal complaints in South Carolina, no provision of South Carolina law vests any "rights" in the private citizen at any stage of the prosecution, from the filing of the complaint seeking an arrest warrant to final conviction. In South Carolina, the citizen simply has no individual interest in the seeking or issuance of an arrest warrant except as a citizen and as a witness. *State v. Addison, supra.*[6]

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[6]It is well recognized that a private citizen possesses no greater status than that of a mere witness *at any stage of a criminal prosecution. People v. Brim*, 199 N.Y.S.2d 744. This Court, in another context, only recently observed that "[t]he fact that a person may be an important, or even critical, witness does not, however, give him a constitutional right to testify." *O'Bannon v. Town Court Nursing Center*, 441 U.S. 904, 65 L.Ed.2d 506, 517, N.15 (1980). The Fourth Circuit completely ignored this language in the *O'Bannon* case and held in effect that in a criminal prosecution, a constitutional right to be a witness does exist and may not be interfered with. It is unclear why *O'Bannon* may be ignored in the context of criminal procedings, especially when, as shown, the criminal process vests no private "rights". *Linda R. S. v. Richard D., supra.*

Yet, the Fourth District has attempted to escape the holding of *Linda R. S.* and its South Carolina counterpart, *State v. Addison,* by artificially segregating the various stages of prosecution. The Court sought to distinguish *Linda R. S.* merely by saying that "the district court did not hold that the solicitor was obliged to *prosecute* the warrants." [emphasis added].

Such a segregation is meaningless, and there is no support for it either in *Linda R. S.* or in South Carolina law. In South Carolina, where an arrest warrant is sought, the initiation of the prosecution occurs at the time the complaint is made before the magistrate. *State v. Addison, supra,* at 361; *State v. Howard,* 15 Rich. [S.C.] 282. *See also, Terry v. Ohio,* 392 U.S. 1, 26 (1968) ["an arrest is the initial state of a criminal prosecution."]; *State v. Olson,* 250 N.W.2d 12, 17 [the criminal complaint is the "first step of many steps in a criminal prosecution."]; *People v. Muka, supra* [no right to file a criminal complaint, because "private citizen has no right to *prosecute* a federal crime."] Certainly, the Court in *Whitley v. Commonwealth,* Mass., 339 N.E.2d 890, perceived no such distinction between arrest warrants and prosecutions in applying *Linda R. S.* to the arrest stage. The *only* legitimate purpose in seeking an arrest warrant is the criminal prosecution of an individual. Thus, the Court of Appeals' characterization of the seeking of an arrest warrant and "prosecution" as different processes for purposes of determining the applicability of *Linda R. S.* is without foundation and represents an undermining of this Court's intent.

In short, the Fourth Circuit's ill-founded extension of a constitutional right of access into the area of criminal prosecutions undermines the state's entire criminal system. It reinstitutes the ancient notion that private persons who may have been wronged by a violation of the criminal laws can control the enforcement of those laws. Irrespective of respondents' status as prison inmates, they

as private citizens possess no constitutional right in the criminal prosecution of another. *Linda R. S. v. Richard D., supra.* Certainly, if there was no constitutional violation present in the Solicitor's conduct, petitioners cannot be held liable for their contact with him or for their failure to alter that course of conduct. *Post* at 18.

The role of the private citizen as a participant in criminal prosecutions is the central issue here. Government's allowance of its prosecuting authority to have input in and even control the determination whether a criminal complaint is filed or an arrest warrant is issued, reflect just as does *Linda R. S.*, a widespread recognition in this country that at every stage of prosecution, decisions must be made by public prosecutors, not private citizens. Certainly, in *Linda R. S.* this Court possessed no constitutional misgivings with respect to such a basic recognition. Thus, if the private citizen is now to be given a constitutionally protected place in criminal prosecutions, and *Linda R. S.* be given no meaning in the arrest warrant setting, it should be this Court and not the Fourth Circuit which mandates it.

B.

The Decision of the Fourth Circuit Misuses The Cases of this Court to Create a New Constitutional Right.

The Fourth Circuit has, whether it wishes to call it so or not, created the new and never before recognized constitutional right of access to the criminal courts. In so doing, it has misused and undermined this Court's clearly limited decisions involving access to the courts.

Those cases relied upon by the district court and apparently adopted by the Fourth Circuit, all dealt with *habeas corpus* and civil rights actions, as well as the rights of criminal defendants. Nowhere in any of these cases involving prisoner access [e.g. *Bounds v. Smith*, 430 U.S.

817 (1977); *Johnson v. Avery*, 393 U.S. 483 (1969); *Procunier v. Martinez*, 416 U.S. 396 (1974)] is there even a suggestion that prisoners possess a right of access to the criminal courts, to seek arrest warrants.

When the constitutional right was extended from *habeas corpus* to civil rights actions, this Court saw the need to articulate the reasons why the actions were similar and constitutional protections required. *See, Wolff v. McDonnell*, 418 U.S. 539 (1974). Here however, the Fourth Circuit, relying upon no case where this Court has even hinted that the right of access extends beyond these well-defined limitations, has starkly created a right of access to the *criminal* courts. Nowhere in either the district court or Fourth Circuit's opinion is the need for the creation of such a right analyzed or articulated, especially where those forms of access, civil actions and §1983 actions, recognized by *Wolff* remained available to respondents throughout. Surely, this Court did not intend the mere recitation of the phrase "access to the courts" to make the constitutional right all encompassing.

Moreover, here, since resort to the *criminal* courts is not respondents' "sole path to relief"[7] [assuming *arguendo* that *Linda R. S.* was wrong and private rights are bestowed], their equal access to the courts was not unconstitutionally denied. *See, United States v. Kras*, 409 U.S. 434 (1973), [severely undermining *Lane v. Correll*, 434 F.2d 598 (5th Cir. 1970), cited by the District Court]; *Boddie v. Connecticut*, 401 U.S. 371 (1971).

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[7]Respondents could easily have sued in the civil courts of South Carolina the very same guards against whom they sought arrest warrants. Moreover, the avenue of a §1983 action remained equally open and available to them in either the state or federal courts and in fact respondents in this very same lawsuit availed themselves of the §1983 remedy against these guards. *Order of District Court*, dated September 28, 1978.

The district court made no finding that the state's interest in seeking an independent investigation prior to the initiation of a criminal proceeding was not substantial. The risks inherent in permitting inmates to appear at their whim before magistrates to swear out cross-warrants against prison guards must remain an important consideration. *Compare, Funn v. Winston,* 612 F.2d 880 (4th Cir. 1980); *see also, Oyler v. Boles,* 368 U.S. 448 (1962); *Bordenkircher v. Hayes,* 434 U.S. 357 (1978). Without a determination that such a policy was lacking in justification, no Equal Protection violation may be found.

C.

The Decision of the Court of Appeals Severely Undermines This Court's Decisions In The Area of Personal Liability of Public Officials Under §1983

The Fourth Circuit found petitioners personally liable in damages to respondents. The decision relied upon the district court's reasoning that the constitutional right of access to the criminal courts was "clearly established" in 1974 and that petitioners "knew or should have known" that their conduct violated respondents' rights. Such a conclusion radically alters the standard of good faith immunity articulated by this Court in *Wood v. Strickland,* 420 U.S. 308 at 322 (1975), and *Procunier v. Navarette, supra,* by now requiring public officials to act at their peril in determining constitutional law.

It is simply incongruous to assume that petitioners had such superior knowledge of the law that they could foresee or divine a right of access to the criminal courts, when such a "right" was evidently not envisioned or "established" until the Fourth Circuit's ruling. Certainly, as has been shown, no such prediction was reasonable or even imaginable from the cases cited by the district court

as existing in 1973 or from subsequent decisions. *See, e.g., Linda R. S. v. Richard D., supra; Whitley v. Commonwealth, supra; Inmates of Attica Correct. Facility v. Rockefeller,* 477 F.2d 375 (2d Cir. 1973) [where the Second Circuit could not discern the effect of *Linda R. S.* in an arrest setting]; *Moses v. Kennedy,* 229 F. Supp. 762 (D.D.C. 1963); *People v. Muka, supra; Bounds v. Smith, supra* [and cases cited therein]; *United States v. Kras, supra* [and cases cited therein]. Certainly none of these cases suggested the Fourth Circuit's holding, i.e., that segregation of the stages of criminal prosecution was appropriate, in order to find private rights in the seeking of arrest warrants, while still acknowledging their absence in later stages. If these petitioners had examined *Linda R. S.* and read it together with *State v. Addison, supra, Terry v. Ohio, supra, etc.* surely they would have reasonably concluded that their conduct was entirely constitutional. *Compare, Inmates of Attica, supra.* Again, if absolute liability is now to be the standard under §1983, this Court should make that determination.

Moreover, the Fourth Circuit, as well as the District Court, concluded that petitioner Leeke violated §1983 merely by "acquiescing to the plan [of interference] which he could have aborted." It is clear that such conduct, absent petitioner's personal involvement, does not constitute a violation of §1983, even assuming as did the Fourth Circuit that petitioner somehow possessed control over the Solicitor's prosecutorial policy or the magistrate's own decision to issue the warrants. *See, Rizzo v. Goode,* 423 U.S. 362 (1976).

CONCLUSION

For all the foregoing reasons, this petition for certiorari should be granted.

Office of Attorney General
Attorneys for Petitioners

APPENDIX

Argued December 3, 1980 Decided December 30, 1980

Before BUTZNER, Circuit Judge, FIELD, Senior Circuit Judge, and MURNAGHAN, Circuit Judge.

Emmet H. Clair, Deputy Attorney General (Daniel R. McLeod, Attorney General, Edwin E. Evans, Assistant Attorney General, Robert D. Cook, Assistant Attorney General, Larry C. Batson, Legal Advisor, South Carolina Department of Corrections on brief) for appellants; Allan R. Holmes for appellees.

PER CURIAM:

The Commissioner of the South Carolina Department of Corrections, and a former legal advisor to the Department, appeal the judgment of the district court ordering them to pay monetary damages to two prisoners pursuant to 42 U.S.C. §§1983 and 1985(3). With respect to the legal advisor, the district court held:

> This Court finds as a matter of law that [the defendant legal advisor] conspired with several individuals for the purpose of depriving plaintiffs, as prison inmates, of equal access to the courts, and for the purpose of preventing or hindering [a magistrate], as a constituted authority of the State of South Carolina, from giving or securing to these plaintiffs equal protection of the law.

The court found that the legal advisor violated both §1983 and §1985(3) and acted with sufficient malice to justify punitive damages. Further, the court held that while the Commissioner violated §1983 by improperly acquiescing to the plan which he could have aborted, he

did not willfully participate in the conspiracy in violation of §1985(3), nor act with malicious intent.

The state officials argue that the prisoners suffered no constitutional deprivation because, "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." Linda R. S. v. Richard D., 410 U.S. 614, 619 (1973). The district court correctly noted, however, that the real question involved here is "whether or not plaintiffs have a constitutional right to seek an arrest warrant." The court held that the prisoners do have a "clearly established" right of access to the courts and that it is "unlawful, and indeed unconstitutional, for state officials to actively interfere with a prisoner's access to the courts." *See* Timmerman v. Brown, 528 F.2d 811, 815 (4th Cir., 1975). The district court did not hold that the solicitor was obliged to prosecute the warrants.

Upon consideration of the record, briefs and oral argument, we conclude that the distict court's judgment is amply supported by the evidence and that the court committed no error of law. We affirm for reasons adequately stated by the district court. Timmerman v. Leeke, No. 74-452 (D.S.C., Sept. 28, 1978).

AFFIRMED.

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*The proceedings were conducted in accordance with our remand in Timmerman v. Brown, 528 F.2d 811 (4th Cir., 1975).

APPENDIX B

In The

United States District Court

for the

DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Civil Action No. 74-452

ORDER

MELVIN LEE TIMMERMAN, and ROBERT THOMAS, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

WILLIAM LEEKE, individually and in his official capacity as Director of the South Carolina Department of Corrections; PETER THEM, individually and in his official capacity as legal advisor to the South Carolina Department of Corrections; J. W. STRICKLAND, individually and in his official capacity as Warden of the Central Correctional Institution of the State of South Carolina; SAMUEL BENJAMIN, WILLIAM WESTON, ROBERT ERVIN, TERRY HART and SAMUEL JACKSON, individually and in their official capacities a Corrections Officers of the Central Correctional Institution of the State of South Carolina; the HONORABLE FRANCHOT A. BROWN, individually and in his official capacity as Magistrate for the County of Richland, State of South Carolina; JOHN FOARD, individually and in his official capacity as Solicitor for the Fifth Judicial Circuit for the State of South Carolina; JAMES ANDERS, individually and in his official capacity as Solicitor for the Fifth Judicial Circuit for the State of South Carolina; and their AGENTS, SUBORDINATES, AND EMPLOYEES,

Defendants.

This matter began with the filing of a complaint on April 9, 1974, by the attorney for the individual named plaintiffs, Melvin Lee Timmerman and Robert Thomas, then prison inmates at the Central Correctional Institution. The complaint requested class certification, declaratory and injunctive relief, as well as money damages. The gravamen of the complaint was that the inmate plaintiffs were, in an incident at the Central Correctional Institution on August 11, 1973, unnecessarily beaten by prison guards; that to protect themselves from this kind of physical abuse they announced their intentions to seek criminal arrest warrants against their alleged prison guard assailants; that in efforts to keep the inmates from having the arrest warrants issued at their instance, the defendants conspired in bad faith to institute criminal charges against the inmates for their parts in the incident of August 11, 1973, and conspired in bad faith to block the issuance of the arrest warrants for the prosecutions of prison guard attackers. The plaintiffs alleged that the defendant magistrate had determined that probable cause existed for the issuance of the arrest warrants they had requested.

The complaint sought preliminary and permanent injunctive relief, including an Order enjoining the pending state court criminal prosecutions of plaintiffs; an Order enjoining the defendant magistrate from failing to issue the arrest warrants against the prison guards; and an Order enjoining all the defendants with the exception of the defendant magistrate from further interfering with the issuance or non-issuance of criminal warrants by any court. Additionally, the plaintiffs sought a declaratory judgment that the policy of the defendant solicitor with reference to non-issuance of criminal warrants at the behest of inmates violated the Fourteenth Amendment to the United States Constitution.

Finally, the plaintiffs requested an award of money damages for the violations by the defendants of

protections afforded the plaintiffs by the Constitution.

With the filing of the complaint, an Order dated April 9, 1974, directed the defendants to show cause why the state court criminal prosecutions of the plaintiffs should not be enjoined by this Court. The attorney for the defendants then moved that two of the defendants, then State Court Magistrate Franchot A. Brown and then State Court Solicitor John Foard be dismissed as parties to this action on the basis of judicial immunity from suit. This motion was granted after hearing by an Order of this Court dated July 15, 1974. An Order of December 18, 1974, certified the Order of Dismissal for appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Appeal was taken, and an opinion of the United States Court of Appeals for the Fourth Circuit dated December 18, 1975, reversed the decision of the District Court and remanded for further proceedings consistent with the opinion of the Court of Appeals. *Timmerman v. Brown*, 528 F.2d 811 (4th Cir. 1975).

On remand this Court took judicial note that defendant Foard was no longer a solicitor and that no attempt had been made to link his successor in office to any bad faith criminal prosecution. Thus, by Order of April 27, 1976, Foard was dismissed as a defendant. Defendant Magistrate Brown was also dismissed by this Order. The Court was under the impression that defendant Brown had not determined that probable cause existed for the issuance of the warrants requested by the plaintiffs and that injunctive relief was therefore unavailable. In retrospect, it appears that this determination was erroneous in that facts presented at subsequent hearings indicate that probable cause for issuance had been determined by Brown to exist. However, this was harmless error as the warrants were subsequently issued at the instance of the plaintiffs, thereby mooting their request for injunctive relief as regards defendant Brown. In any case, after the Order of April 27, the plaintiffs

sought to amend their complaint by adding the new solicitor as a defendant, retaining defendant Brown, and attempting to obtain an Order temporarily restraining their state criminal prosecutions. The amendments were allowed after a hearing held on May 3, 1976. The temporary restraining Order sought by the plaintiffs was also granted at that hearing. The plaintiffs were directed that they were to once again seek indictments and/or arrest warrants against the defendant prison guards through the state criminal justice system before this Court would finally enter or deny an injunction pursuant to that portion of their complaint seeking the warrants.

Plaintiffs succeeded in convincing defendant Brown to issue the arrest warrants requested. On May 20, 1976, and May 25, 1976, a non jury trial was held on all issues excepting the complaints by the plaintiffs of physical abuse by the defendant prison guards and the subsequent denials by the defendants of necessary medical care. This Court, as a result of the hearings, allowed the defendants to proceed with their criminal prosecutions of the plaintiffs. This Court found for the plaintiffs on their other constitutional claims regarding the defendants' improper interference with the issuance of arrest warrants. An explication of these findings and the legal authority supportive thereof follows hereafter in the parts of this opinion headed Findings of Facts and Conclusions of Law.

A damages hearing was held June 2, 1976. Because of the potential collateral effect guilty verdicts might have on the remaining issues to be tried, the trial of the case was recessed until after the state criminal prosecutions of the plaintiffs were completed. Counsel have informed the Court that these prosecutions ended with the plaintiff Timmerman found not guilty on all counts and the plaintiff Thomas found guilty on two counts of simple assault and battery. Counsel for the plaintiffs indicates his belief that the conviction of plaintiff Thomas has no

collateral effect upon his claims in this proceeding in that this conviction apparently resulted from assaults produced by his defense of Timmerman and had no factual impact on his claims of physical abuse and denial of medical treatment. All of this appears academic, however, as the plaintiffs, now freed from prison, have filed a Motion to Dismiss without prejudice these remaining claims. The memorandum supportive of this motion evinces the opinion of the plaintiffs that the reaction of the Court to their already tried claims is likely to provide the primary relief sought. Plaintiffs reason that the claims upon which they have prevailed and the relief they are to obtain are directed toward higher ranking officials capable of substantially impacting prison conditions. Plaintiffs apparently feel that any further trial of their claims against the prison guards would produce very little in the way of meaningful change of prison conditions.

In addition to the other pending motion, the attorney for the plaintiffs has filed a motion so as to allow an award of attorneys fees for the plaintiffs pursuant to the Civil Rights Attorneys Fees Act of 1976, 42 U.S.C. 1988. This Court has considered all of these matters, and in an attempt to finally determine this action, enters and makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The testimony of all witnesses in this action indicates that on August 11, 1973, an incident occurred at the Central Correctional Institution in Columbia, South Carolina, involving the plaintiffs and the prison guards named as defendants in this action. Accounts as to what occurred during that incident and what provocation existed on either side vary substantially. Suffice it to say that all witnesses agree that there was a melee of the first order.

2. As a result of this incident, plaintiff Timmerman first announced this intention to seek and subsequently sought to institute criminal proceedings against the prison guard defendants. Timmerman was himself charged with criminal acts as a result of the incident of August 11, and he enlisted the assistance of his public defender in his efforts to obtain arrest warrants from then Magistrate Franchot A. Brown. Testimony taken showed that, in addition to the sworn statements of plaintiff Timmerman, supportive of issuance of the warrants, Magistrate Brown had also received confidential information from an employee of the Central Correctional Institute, an ombudsman, who purported to have investigated the incident and to have determined that plaintiffs Timmerman and Thomas were victimized by the defendant prison guards. At the hearing before this Court, it was established that this information was suspect at best. The significance of this information is simply that it, together with the affidavits of plaintiff Timmerman, convinced Magistrate Brown that probable cause existed for the issuance of the arrest warrants against the prison guards. This was proven explicitly both by the testimony of Magistrate Brown, as well as by Plaintiffs' Exhibit 11 (letter from Brown to Timmerman, dated November 15, 1973). At this point, the public defender representing plaintiff Timmerman had already prepared warrants and given them to Magistrate Brown for execution. (See letter of John Delgado to Melvin Lee Timmerman, submitted by the parties and now Court's Exhibit 1.)

3. Magistrate Brown informed defendant Peter Them, then a legal advisor to the South Carolina Department of Corrections, that he intended to issue the warrants that Timmerman requested and told defendant Them to arrange to have the officers brought before the Magistrate to have the warrants published. Defendant Them then relayed this information to Warden Joe Martin at CCI. The two discussed the matter, and, in an

effort to see that the legal action against the correctional officers be dropped, concluded that defendant Them should meet with Richland County Sheriff Frank Powell, Deputy Attorney General J. C. Coleman, and Solicitor Foard. Powell, Coleman and Foard all made recommendations as to how the action against the correctional officers could be stopped. The various possible courses of action were discussed among defendant Them, Warden Martin, Department of Corrections Public Relations Chief Sam McCuen, and Legal Advisor William Lucius. The course that was adopted was the recommendation by Solicitor Foard that he would write a letter to Magistrate Brown requesting that Magistrate Brown not issue the warrants and stating that Foard would ask the State Law Enforcement Division to conduct an investigation surrounding the charges made against the four officers. According to Plaintiffs' Exhibit I (Confidential Memorandum from Peter Them to William Leeke), Foard stated that there would be no indictments against any of the correctional officers, except possibly Officer Hart. The letter was written and received by Magistrate Brown, who complied with Foard's request (See Plaintiffs' Exhibits I and II).

At the trial, Director Leeke of the Department of Corrections expressed only minor reservations about the propriety of the activities described by the memorandum. His testimony indicated that he felt that the meeting held to discuss the matter of the criminal warrants was a "reasonable approach." It is clear that Leeke did not attend the meeting, did not authorize the meeting, and did not find out about the letter to Brown, until these activities and events had already taken place. However, he admitted that he did have the responsibility to provide inmates with access to the courts, but that he did not question the participants in the above described activities to see why such access was not allowed. Leeke had supervisory control over Them, Martin, McCuen, and

Lucius. He also had knowledge of the actions taken to deny plaintiffs of their civil rights. However, Leeke stated at trial that the Department of Corrections relies heavily on the Solicitor's Office and the Attorney General for legal advice. Moreover, he expressed a duty to defend his employees when actions have been instituted against them. On the other hand, he admitted that it is not the policy of the Department of Corrections to interfere with prosecutions against its employees.

CONCLUSIONS OF LAW

A. This Court has jurisdiction of this matter pursuant to 28 USC §1343.

B. As an initial proposition, this Court must set forth what it does not find. This Court draws no conclusion as to Magistrate Brown regarding whether or not he acted alone or in concert under color of state law to deprive plaintiffs of their right to equal access to the courts secured by the Fourteenth Amendment to the Constitution, in violation of 42 USC §1983 and §1985. This Court makes no finding as to Magistrate Brown because the injunctive relief issue as to him is now moot and because he is immune from monetary damages under the doctrine of judicial immunity. *Timmerman, supra.* The same abstention applies to Solicitor Foard because of his quasi-judicial immunity. *Timmerman, supra.* This Court also makes no finding as to liability under §§1983 and 1985 for Powell, Coleman, McCuen, Lucius, or Martin. Though plaintiffs seek to hold liable the "agents, subordinates, and employees" of the named defendants, that designation will not suffice to extend this Court's jurisdiction over any of the five. Powell and Coleman are not "agents, subordinates, or employees" of any of the named defendants. As to McCuen, Lucius, and Martin, though they *may* be considered agents, subordinates, or employees of Leeke, Rule 10(a) of the

Federal Rules of Civil Procedure specifically provides that "[i]n the complaint the title of the action shall include the *names* of all the parties . . ." (Emphasis added.) Plaintiffs' designation of "agents, subordinates, and employees" does not meet the requirement of Rule 10. Neither does it satisfy the requirements of due process since only the named defendants could be and were served. This Court does not have jurisdiction over anyone other than the defendants who were named and served. *United States ex rel. Lee v. Illinois*, 343 F.2d 120 (7th Cir. 1965). Therefore, this Court makes no finding as to Powell, Coleman, McCuen, Lucius, or Martin.[1]

C. As to defendants Leeke and Them, this Court is governed by the recently enunciated standards for prison officials set forth in *Procunier v. Navarette*, U.S. , S.Ct. , 55 L.Ed. 2d 24 (1978). *Procunier* adopted the two-pronged test of *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed. 2d 214 (1975), as the guidepost for determination of whether or not prison officials should enjoy the cloak of qualified immunity or be stripped of its protection. The Court in *Procunier* extended the first prong of the *Wood* analysis to prison officials in the following language:

> We agree with petitioners that as prison officials and officers, they were not absolutely immune from liability in this §1983 damages suit and could rely only on the qualified immunity described in Scheuer v. Rhodes, supra [416 US 232, 94 S.Ct. 1683, 40 L.Ed. 2d 90 (1974)], and Wood v. Strickland, supra . . . .
>
> * * *
>
> Under the first part of the Wood v. Strickland rule, the immunity defense would be unavailing to

[1]The evidence presented at the trial of this matter failed to implicate named defendant Strickland by a preponderance of the evidence. This Court therefore holds that Warden Strickland is not liable to plaintiffs under either 42 USC §1983 or §1985.

petitioners if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they knew or should have known of that right and if they knew or should have known that their conduct violated the constitutional norm. . . .

In applying this test to the facts of that case, the Court stated:

Petitioners claim that in 1971 and 1972 when the conduct involved in this case took place there was no established First Amendment right protecting the mailing privileges of state prisoners and that hence there was no such federal right about which they should have known. We are in essential agreement with petitioners in this respect and also agree that they were entitled to judgment as a matter of law.

Thus, the first question to be determined by this Court is whether or not there was a "clearly established" constitutional right to access to the courts by prisoners in 1973. Though this Court is somewhat troubled by the question of whether or not the right to access was "clearly established" in 1973 as extending to arrest warrants instituted by prisoners, this Court must accept the somewhat less than emphatic determination of the Fourth Circuit in *Timmerman , supra,* wherein that Court stated:

We have no doubt that plaintiffs, even though they are inmates, have some first and fourteenth amendment rights to air their grievances and to have access to judicial procedures to redress them. *Procunier v. Martinez,* 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974); *Cruz v. Beto,* 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972); *Johnson v. Avery,* 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969); *Dowd v. United States ex rel. Cook,* 340, U.S. 206, 91 S.Ct. 262, 95 L.Ed. 215 (1951); *Cochran v. Kansas,* 316 U.S. 255, 62 S.Ct. 1068, 86 L.Ed. 1453 (1942); *Lane v. Correll,* 434 F.2d 598, 600 (5 Cir. 1970). . . .

The cases cited by the Fourth Circuit do not deal with the precise issue faced by this Court. They involve a prisoner's right to seek redress in the courts "in order to challenge unlawful convictions and to seek redress for violations of their *constitutional* rights." (Emphasis added.) *Procunier v. Martinez, supra,* at 416 U.S. 419. This Court does not deny that the right to seek relief by way of habeas corpus or §1983 was "clearly established" in 1973. Moreover, that right has been expanded since then, e.g. *Bounds v. Smith,* 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). Plaintiffs here clearly have that right and are presently asserting it. But the real question involves the underlying *constitutional* claim which is the *basis* of this §1983 action. In other words, the question is whether or not plaintiffs have a constitutional right to seek arrest warrants. That is the specific right to access at issue here. In *Lane v. Correll,* 434 F.2d 598 (5th Cir. 1970), Judge Bell (now Attorney General) held that "a citizen has no constitutional right to have an arrest warrant issued. The only constitutional right involved here is the citizen's ability to set in motion the governmental machinery which redresses violations of municipal ordinances; i.e., the right to seek an arrest warrant." This Court believes that the present plaintiffs did not have a meaningful ability to set in motion the governmental machinery because the above described activities stopped the machinery unlawfully, not in a proper way, as for example, upon a valid determination of lack of probable cause. It seems clear that for many years, it has been unlawful and indeed unconstitutional, for state officials to actively interfere with a prisoner's access to the courts. *Ex parte Hull,* 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941). This fact, together with Judge Winter's observation in *Timmerman,* push this Court, so to speak, to a plateau from which it can in good conscience state that the right to access to the courts which plaintiffs assert here was "clearly established" in 1973.

The second question to be decided is whether or not defendants Leeke and Them knew or should have known of that right. Leeke testified that he recognized that he had a responsibility to provide access to the courts. Them was a legal advisor with the Department of Corrections. If he did not know of this right, he at least should have known.

The last question is whether Leeke and Them knew or should have known that their conduct violated the constitutional norm. The whole purpose behind Them's activities was to deprive plaintiffs of this right. He certainly knew or should have known that his activities violated this right. Leeke obtained knowledge of the plan to deprive plaintiffs of their right to the courts. His conduct in not taking any steps to rectify the situation in effect furthered the efforts of Them and his partners. He knew or at least should have known that without his intervention, plaintiffs would be deprived of their right to the courts.

Having established all the requirements necessary to strip defendants Leeke and Them of their qualified immunity, this Court holds that they are liable for damages to plaintiffs under §1983. Were it not for the fact that plaintiffs seek punitive damages in this action, it would not be necessary to reach the second prong of the *Wood* test, as applied to prison officials by *Procunier*. The Court in *Procunier* stated that the second branch of the *Wood* test ". . . would authorize liability where the official has acted with 'malicious intention' to deprive the plaintiff of a constitutional right or to cause him 'other injury.' This part of the rule speaks of 'intentional injury,' contemplating that the actor intends the consequences of his conduct. . . ."

This Court state at the trial of this matter that it preferred to use the term "bad faith" rather than "malicious" to describe the activities of the participants in the plan to thwart plaintiffs' access to the courts.

However, having established the right to arrest warrants by prisoners (based, of course, on probable cause), this Court must now conclude that defendant Them's conduct was carried out with "malicious intention." This conclusion is mandated by the Supreme Court's description of "malicious intention" as simply intending to deprive someone of his rights. This Court cannot characterize Leeke's conduct as "malicious." Leeke's acquiescence in the plan was improper because he should have known that his failure to act would result in plaintiffs' being deprived of their rights. However, there is no evidence that Leeke *intended* to deprive plaintiffs of their rights.

Thus, this Court concludes that Leeke and Them violated §1983 and are thus liable to plaintiffs for the damages caused thereby. Moreover, Them's actions were malicious and he is subject to punitive damages.

D. Having determined that defendants Leeke and Them are not entitled to qualified immunity and that they have violated §1983, this Court must now turn to plaintiffs' claim that defendants conspired for the purpose of depriving them of their equal protection under the laws in violation of 42 USC §1985. Since this is a civil, not criminal action, this Court must first define "civil conspiracy" which is "a combination of two or more persons to do an unlawful or criminal act or to do a lawful act by unlawful means or for an unlawful purpose." *Ammlung v. City of Chester*, 494 F.2d 811 (3rd Cir. 1974). This Court perceives no substantive difference between this definition and the definition of criminal conspiracy as found in 2 Federal Jury Practice and Instructions, 3rd Ed., §27.04:

> A conspiracy is a combination of two or more persons, by concerted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. . . .

This Court does not feel that there is any real difference between civil and criminal conspiracy, other than the fact that criminal conspiracy can be a crime in and of itself, and civil conspiracy is a tort. As a consequence of this distinction, however, there is a difference in the burden of proof required to establish conspiracy. Taking into account these distinctions, this Court will be guided by the principles set forth in the above-cited jury instruction manual:

> . . . What the evidence in the case must show . . . is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

Id. §27.04.

> Before the jury may find that a defendant, or any other person, has become a member of a conspiracy, the evidence in the case must show . . . that the conspiracy was knowingly formed, and that the defendant, or other person who is claimed to have been a member, willfully participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy.

Id. §27.05

This Court finds as a matter of law that defendant Them conspired with several individuals for the purpose of depriving plaintiffs, as prison inmates, of equal access to the courts, and for the purpose of preventing or hindering Magistrate Brown, as a constituted authority of the State of South Carolina, from giving or securing to these plaintiffs equal protection of the laws. Them thereby violated 42 USC §1985(3) and is liable to the plaintiffs for damages.

There is no evidence that defendant Leeke came to any mutual understanding with the conspirators to try to accomplish the unlawful plan. Moreover, there is no

evidence that he willfully participated in the plan or that he had any intent to further or advance some object or purpose of the conspiracy. This Court holds, as a matter of law, that he has not violated 42 USC §1985(3) as to these plaintiffs.

E. Since the state criminal trials of plaintiffs have been concluded, the question of enjoining the state criminal prosecutions of plaintiffs is now moot. However, the Court will explain its earlier determination to allow the prosecutions to proceed. The Court notes that the evidence presented might possibly support a finding that the original prosecutions of plaintiffs were in bad faith. However, plaintiffs failed to link the present Fifth Circuit Solicitor, James Anders, with any bad faith prosecution. This Court believes that even if a prosecution is initiated with an improper motive, when a subsequent solicitor objectively determines that sufficient merit exists for continuing the prosecution, then the prosecution should not be enjoined. Otherwise, an improperly motivated prosecutor could forever bar the right of the public to be protected by the conviction and imprisonment of criminals.

F. The defendants have evidenced no objection to plaintiffs' Motion to Dismiss without prejudice the claims of plaintiffs relating to physical abuse and denial of medical care arising from the August 11, 1973, incident. Therefore, the motion is granted.

G. Having determined that plaintiff's constitutional rights have been violated in the manner described hereinabove, the Court must now turn to the question of damages. The only defendants held to have violated §1983 are defendants Leeke and Them. Only defendant Them has been held to have violated §1985. Thus, only Leeke and Them are liable for damages.

Plaintiffs are entitled to damages for the deprivation of their constitutional rights. This Court believes that an

award of $2,000.00 is proper compensation for the loss of these rights.

Plaintiffs also suffered emotional distress due to defendants' activities. This Court finds that an award of $1,000.00 is proper compensation for these damages.

This Court has determined that defendant Them acted maliciously. Therefore, an award of punitive damages is appropriate against defendant Them in the amount of $1,000.00.

H. Finally, plaintiffs, as prevailing parties, are entitled to receive an award for a reasonable attorney's fee under the 1976 amendment to 42 USC §1988 which provides in pertinent part as follows:

> . . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This amendment became effective on October 19, 1976, but it applies to all actions pending at the time of its enactment. *Hodge v. Seiler*, 558 F.2d 284 (5th Cir. 1977); *Simpson v. Weeks*, 570 F.2d 240 (8th Cir. 1978). This action was pending at the time of the enactment of the §1988 amendment. Thus, attorney's fees should be awarded plaintiffs "unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 19 L. Ed.2d 1263 (1968). See *Wharton v. Knefel*, 562 F.2d 550 (8th Cir. 1977), reh. and reh. en banc den. October 13, 1977, for an explanation of the reasons why this standard controls fee awards under §1988. This Court does not find any special circumstances which would render an award of attorney's fees unjust. Thus, plaintiffs are entitled to a reasonable attorney's fee. However, plaintiffs' attorney indicates that he was appointed by the Court of Appeals for the appeal taken in this action. That portion of this

case shall thus be excluded from the computation of the attorney's fees. The parties to this action shall attempt to agree upon a reasonable fee. Should agreement not be forthcoming, plaintiffs' attorney shall submit such evidence as is appropriate and necessary for the Court to make a determination. Defendants shall have a reasonable time thereafter to respond.

ORDER

IT IS, THEREFORE, DECLARED that the conduct of defendants Leeke and Them deprived plaintiffs of the protections afforded them by the Fourteenth Amendment.

IT IS, THEREFORE, ORDERED that plaintiffs be awarded judgment for actual damages against defendants Leeke and Them in the amount of $3,000.00.

IT IS FURTHER ORDERED that plaintiffs be awarded punitive damages against defendant Them in the amount of $1,000.00.

IT IS FURTHER ORDERED that plaintiffs be awarded a reasonable attorney's fee to be later determined pursuant to the procedures outlined hereinabove.

IT IS FURTHER ORDERED that the claims of plaintiffs based upon alleged physical abuse and denial of medical treatment be and the same are hereby dismissed without prejudice.

AND IT IS SO ORDERED.

ROBERT F. CHAPMAN
United States District Judge

September 28, 1978
Columbia, South Carolina

APPENDIX C

United States District Court

for the

DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Civil Action File No. 74-452

JUDGMENT

MELVIN LEE TIMMERMAN, and ROBERT THOMAS, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

WILLIAM LEEKE, individually and in his official capacity as Director of the South Carolina Department of Corrections; PETER THEM, individually and in his official capacity as legal advisor to the South Carolina Department of Corrections; J. W. STRICKLAND, individually and in his official capacity as Warden of the Central Correctional Institution of the State of South Carolina; SAMUEL BENJAMIN, WILLIAM WESTON, ROBERT ERVIN, TERRY HART AND SAMUEL JACKSON, individually and in their official capacities as Corrections Officers of the Central Correctional Institution of the State of South Carolina; the HONORABLE FRANCHOT A. BROWN, individually and in his official capacity as Magistrate for the County of Richland, State of South Carolina; JOHN FOARD, individually and in his official capacity as Solicitor for the Fifth Judicial Circuit for the State of South Carolina; JAMES ANDERS, individually and in his official capacity as Solicitor for the Fifth Judicial Circuit for the State of South Carolina; and their AGENTS, SUBORDINATES, AND EMPLOYEES,

Defendants.

This action came on for trial before the Court, Honorable Robert F. Chapman, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Plaintiffs recover, of the defendants William Leeke, Director of the South Carolina Department of Corrections and Peter Them, Legal Advisor of the South Carolina Department of Corrections, Three Thousand ($3,000.00) Dollars Actual Damages; and that the Plaintiffs recover of the Defendant Peter Them, Legal Advisor to the South Carolina Department of Corrections, One Thousand ($1,000.00) Dollars Punitive Damages.

IT IS FURTHER ORDERED that the Plaintiffs recover from the defendants William Leeke, Director of the South Carolina Department of Corrections and Peter Them, Legal Advisor of the South Carolina Department of Corrections, a reasonable attorney's fee.

Further, the court having heard and granted Plaintiffs' Motion to Dismiss the claims of alleged physical abuse and denial of medical treatment as to the defendants, Samuel Benjamin, William Weston, Robert Ervin, Terry Hart and Samuel Jackson, Corrections Officers, it is hereby

ORDERED AND ADJUDGED, that the action is hereby dismissed without prejudice as to defendants Samuel Benjamin, William Weston, Robert Ervin, Terry Hart and Samuel Jackson, Corrections Officers.

Further, the court having made no findings to defendants, Honorable Franchot A. Brown, Magistrate for the County of Richland, State of South Carolina; John Foard, Solicitor for the Fifth Judicial Circuit for the State of South Carolina; and James Anders, Solicitor for the Fifth Judicial Circuit for the State of South Carolina, it is

ORDERED AND ADJUDGED that the action is hereby dismissed as to defendants, Honorable Franchot A. Brown, Magistrate for the County of Richland, State of South Carolina; John Foard, Solicitor for the Fifth Judicial Circuit for the State of South Carolina; and James Anders, Solicitor for the Fifth Judicial Circuit for the State of South Carolina.

And further, the Court having found that the defendant, J. W. Strickland, Warden of the Central Correctional Institution for the State of South Carolina, is not liable to Plaintiffs under either 42 U.S.C. §1983 or §19835, it is

ORDERED AND ADJUDGED that the complaint is dismissed as to the defendant, J. W. Strickland, Warden of the Central Correctional Institution for the State of South Carolina.

Dated at Columbia, South Carolina, this 3rd day of October, 1978.

MILLER C. FOSTER, JR.
Clerk of Court

By: TRUDY DEL PRIORE
Deputy Clerk

APPENDIX D

In The

United States District Court

for the

DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Civil Action No. 74-452

ORDER

MELVIN LEE TIMMERMAN, and ROBERT THOMAS, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

WILLIAM LEEKE, individually and in his official capacity as Director of the South Carolina Department of Corrections et al,

Defendants.

This matter is before the Court upon motion of the defendants Leeke and Them pursuant to Rule 59(a) and (e) of the Federal Rules of Civil Procedure seeking reconsideration of this Court's Order of October 3, 1978 and to reopen the judgment to take additional testimony. The Court has reviewed the memorandum of the law submitted by the defendants together with the affidavit and other materials and has also considered the memorandum of the plaintiffs. Since no justifiable reason has been given for either reconsidering the Order or setting it aside and taking additional testimony the present motion must be, and hereby is, denied.

AND IT IS SO ORDERED.

ROBERT F. CHAPMAN
United States District Judge

October 23, 1979
Columbia, South Carolina

APPENDIX E

United States Court of Appeals
FOR THE FOURTH CIRCUIT

No. 75-1208

MELVIN LEE TIMMERMAN, and ROBERT THOMAS, individually and on behalf of all others similarly situated,

Appellants,

vs.

THE HONORABLE FRANCHOT A. BROWN, in his official capacity as Magistrate for the County of Richland, State of South Carolina, and JOHN FOARD, in his official capacity as Solicitor for the County of Richland of the State of South Carolina,

Appellees,

and

WILLIAM LEEKE, in his official capacity as Director of the Department of Corrections of the State of South Carolina, et al.,

Defendants.

Argued August 21, 1975.

Decided December 15, 1975.

Allan R. Holmes, Columbia, S.C. [court-assigned counsel], for appellants.

Frank Wiggins, Washington, D.C., on brief, for amicus curiae for The National Legal Aid and Defender Association.

Emmet H. Clair, Asst. Atty. Gen. of South Carolina (Daniel R. McLeod, Atty. Gen. of South Carolina, and Stephen T. Savitz, Asst. Atty. Gen. of South Carolina, on brief), for appellees.

Before HAYNSWORTH, Chief Judge, and WINTER and CRAVEN, Circuit Judges.

WINTER, Circuit Judge:

In plaintiffs' suit for equitable relief, declaratory relief and money damages because defendants allegedly were violating plaintiffs' first and fourteenth amendment rights by prosecuting them and by suppressing the prosecution of others, the district court granted motions to dismiss in favor of Franchot A. Brown and John Foard, Magistrate and Solicitor, respectively, for the County of Richland, South Carolina. The district court ruled that both defendants were immune from suit since the actions complained of concerned the exercise of their respective judicial and quasi-judicial immunity. After entry of an order certifying the dismissal as a final judgment, Rule 54(b), F.R.Civ.P., this appeal followed.

Although Brown and Foard are immune from suit for money damages, we hold that they are not immune from equitable and declaratory relief. Contrary to the arguments of these defendants, we also conclude that plaintiffs have alleged a cause of action which survives the restrictive rule of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Accordingly, we conclude that dismissal as to Brown and Foard was erroneously granted. We reverse and remand for further proceedings.

I.

For purposes of this appeal, we accept, as we must, the facts as alleged in the complaint. It sets forth that plaintiffs are prisoners incarcerated at the Central Correctional Institution at Columbia, South Carolina.[1] On August 11, 1973, plaintiff Timmerman, falsely accused of being under the influence of alcohol, was brutally assaulted and then handcuffed by certain of the defendant correctional officers of Central. While helpless to defend himself, he was further brutally and maliciously battered by these defendants. Plaintiff Thomas and several other inmates attempted to protect Timmerman from further injury, and as a result of their efforts the beating was discontinued and both plaintiffs were returned to their cells. Although Timmerman suffered multiple physical injuries apparent to anyone observing him, he was denied medical treatment.

Although it is not alleged that Brown and Foard participated in the beating or denial of medical treatment, they were fully informed of the facts. Nonetheless, they conspired to deprive plaintiffs of their right to have access to criminal process to effect punishment on those who committed wrongs on them and their right to speak and write about the wrongs perpetrated upon them. Knowing that plaintiffs wished to bring criminal charges against their attackers, Brown, Foard, their co-conspirators and their agents, transferred plaintiffs to solitary confinement where they are still held. Plaintiffs, nevertheless, caused to be delivered to Magistrate Brown proposed criminal warrants against Timmerman's at-

[1]Plaintiffs allege that they sue for themselves and ask to sue also for all inmates who are, have been, or will be incarcerated in Columbia, South Carolina. Whether a class action may be maintained and, if so, who are the members of the class are not now issues before us.

tackers, charging them with assault and battery, and Magistrate Brown determined that probable cause existed for the issuance of the warrants.

Foard, his co-conspirators and their agents, prevented the issuance of the warrants, however, by notifying Magistrate Brown that inmates could not cause warrants to be brought against correctional officials unless Solicitor Foard determined, on the basis of an independent investigation by the South Carolina Law Enforcement Division (S.L.E.D.), that probable cause existed for their issuance. As a result, Brown refused to issue the arrest warrants. Foard did not cause a S.L.E.D. investigation to be made.[2]

Plaintiffs also allege that they have been maliciously subjected to threats to their lives and safety, denial of parole to Timmerman, and to bad faith criminal charges. They allege that, even though Magistrate Brown dismissed some of the criminal charges against them, they have been indicted, at the instance of Foard, by the grand jury of Richland County for the same, or substantially the same, offenses which Magistrate Brown dismissed. By affidavits which were supplied us in motions relating to this appeal, we were advised that by error these indictments have been *nol prossed.* This aspect of the case is not moot, however, because we are further advised that the state does not intend to give up prosecution of plaintiffs for their part in the incident occurring August 11, 1973. New indictments will be prepared and these

[2]In oral argument, the representative of the Attorney General of South Carolina conceded that the alleged conduct of Foard, if in fact it occurred, would be illegal under state law. Under South Carolina law, the warrants should have issued upon Magistrate Brown's finding that there was probable cause for their issuance. As the prosecutor, Foard might thereafter *nol pros* the prosecution, in open court, if he concluded that the state could not prove a case, but he lacked authority to interfere with issuance of the warrants.

indictments will be presented to the grand jury for Richland County which will convene on August 25, 1975.

In summary, plaintiffs allege that defendants, collectively, in violation of 42 U.S.C. §1983 and 1985, are acting in concert, under color of state law, to deprive plaintiffs individually and as a class of their first and fourteenth amendment rights by abusing plaintiffs without provocation, denying plaintiff Timmerman necessary medical treatment, maliciously and in bad faith causing the issuance of warrants for the arrest and prosecution of plaintiffs, and refusing to allow the issuance of criminal warrants against Timmerman's attackers even though probable cause for their issuance has been found.[3] Plaintiffs therefore sought (a) money damages, (b) a declaration that the espoused policy of Foard to suppress criminal warrants based on probable cause and issued at the instance of inmates of a correctional institution violates the fourteenth amendment, (c) an injunction against defendants, except Magistrate Brown, to restrain them from interfering with the issuance or nonissuance of criminal warrants, (d) an injunction to restrain the pending criminal prosecution against Timmerman and Thomas, and (e) a writ of mandamus requiring Magistrate Brown to issue the criminal warrants against Timmerman's attackers.

[3]From the specific allegations of the complaint, it seems clear that Brown and Foard were not alleged to be direct actors in the alleged beating and denial of medical treatment. Yet they allegedly had knowledge of them and these events lend significance to their alleged subsequent acts.

II.

We agree with the district court that, on the basis of judicial immunity, the complaint against Brown and Foard should be dismissed to the extent, but only to the extent, that it seeks the recovery of money damages. Brown, as a judicial officer, and Foard, as a prosecutor, enjoyed judicial and quasi-judicial immunity, respectively. *Pierson v. Ray*, 386 U.S. 547, 87, S.Ct. 1213, 18 L.Ed.2d 288 (1967); *McCray v. Maryland*, 456 F.2d 1 (4 Cir. 1972). This immunity, however, protects qualified defendants only from claims for money damages. It "does not extend to plaintiff's action for injunctive and declaratory relief under Section 1983, 42 U.S.C." *Fowler v. Alexander*, 478 F.2d 694, 696 (4 Cir. 1973). *See Littleton v. Berbling*, 468, F.2d 389 (7 Cir. 1972), cert. den., 414 U.S. 1143, 94 S.Ct. 894, 38 L.Ed.2d 674 (1974), rev'd on other grounds *sub nom. O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), vacated *sub nom., Spomer v. Littleton*, 414 U.S. 514, 94 S.Ct. 685, 38 L.Ed.2d 694 (1974). *See also Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), where, as here, in a suit against a state prosecuting attorney an circuit judge, the Supreme Court concluded that 42 U.S.C. §1983 is an "expressly authorized" exception to the federal anti-injunction statute, 28 U.S.C. §2283.

We conclude, then, that the district court overextended the doctrine of judicial immunity insofar as it applied it to warrant dismissing Brown and Foard from those aspects of the complaint which sought declaratory and injunctive relief. Unless there is some jurisdictional bar, Brown and Foard should be retained as parties defendant in the action and the case decided on the merits.

III.

Before us. Brown and Foard urge the holdings in *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its progeny as an additional ground why they should be dismissed. Their argument is that under *Younger* the district court lacked jurisdiction, or at least should have abstained from exercising jurisdiction, with respect to the prayer that pending prosecutions against plaintiffs be enjoined. They contend also that, since plaintiffs' prayers for other relief revolve so intimately around South Carolina's criminal law enforcement policy, jurisdiction should not exist as to them or that jurisdiction should not be exercised. We are not persuaded. We think that the allegations in this case put it squarely within one of the exceptions recognized in *Younger* where it is proper for a federal court to restrain a state criminal prosecution. If jurisdiction to determine whether to grant such extraordinary relief exists and may be exercised, it follows that jurisdiction to decide plaintiffs' other prayers for declaratory and injunctive relief also exists and may be exercised. Cf. *Steffel v. Thompson,* 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *Hicks v. Miranda,* 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975).

In *Dombrowski v. Pfister,* 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), the Supreme Court affirmed an injunction against a threatened state prosecution based upon a state statute which unconstitutionally inhibited the right of free speech. The possible scope of *Dombrowski* was sharply restricted, however, in *Younger,* where it was held that the rule was to the contrary when the state criminal proceeding had already commenced. Nevertheless, in *Younger,* the Court significantly qualified the anti-injunction rule announced in that case by suggesting possible exceptions:

> It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a

> statute "on its face" does not in itself justify an injunction against good-faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief. 401 U.S. at 54,91 S.Ct. at 755.

The holding in *Younger* has been extended and refined in a number of subsequent cases. For our purposes, it is unnecessary to analyze subsequent holdings except to note that the exceptions to federal nonintervention suggested in *Younger* have continued to be recognized. In the recent decision in *Kugler v. Helfant*, 421 U.S. 117, 95 S.Ct. 1524, 44 L.Ed.2d 15 (1975), *Younger* was approvingly described:

> [T]he Court in *Younger* left room for federal equitable intervention in a state criminal trial where there is a showing of "bad faith" or "harassment" by state officials responsible for the prosecution . . ., where the state law to be applied in the criminal proceeding is "flagrantly and patently violative of express constitutional prohibitions," . . . or where there exist other "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment."

Accord: *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975); *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

We think that in the instant case plaintiffs have alleged a case of "bad faith" or "harassment" by state officials for the prosecution. As pointed out in *Kugler*, 421 U.S. at 126, n.6, 95 S.Ct. at 1531, "'bad faith' in this context generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." "Harassment" means much the same,

although it also connotes a legal exercise of authority in such a manner as to be unnecessarily oppressive.

Plaintiffs have alleged that Magistrate Brown dismissed charges against them but, nevertheless, they have been, or will be indicted by the grand jury and prosecuted on the same or substantially similar charges. While that allegation alone may not reasonably give rise to the inference that there is little likelihood that they will be convicted, plaintiffs have alleged that Magistrate Brown found that there was probable cause to prosecute some of the defendants for their part in the same incident which purportedly gave rise to the charges against plaintiffs. Of course, it is theoretically possible for two participants in an affray between them both to be guilty of assault. But unless we are to assume the incompetence of Brown or a strong bias in favor of plaintiffs — assumptions for which there is no basis in the record — it is less likely that there is a good case against plaintiffs when a disinterested judicial officer has determined that there is no basis on which to prosecute them but there is a basis on which to prosecute their antagonists. Whatever lingering doubt may exist about the substance of any case against plaintiffs is removed, at this stage of the case, by the further allegation that Foard took steps, concededly illegal if in fact taken, to suppress any prosecution of plaintiffs' antagonists notwithstanding that the Magistrate found probable cause for these prosecutions to go forward.

We have no doubt that plaintiffs, even though they are inmates, have some first and fourteenth amendment rights to air their grievances and to have access to judicial procedures to redress them. *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974); *Cruz v. Beto*, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972); *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969); *Dowd v. United States ex rel. Cook*, 340 U.S. 206, 91 S.Ct. 262, 95 L.Ed. 215 (1951); *Cochran v.*

Kansas, 316 U.S. 255, 62 S.Ct. 1068, 86 L.Ed. 1453 (1942); *Lane v. Correll*, 434 F.2d 598, 600 (5 Cir. 1970). We think that plaintiffs have alleged bad faith and intentionally harassing efforts to deny these rights, including but not limited to bad faith and harassing efforts to prosecute them. We think that plaintiffs have alleged a case within an exception to the restrictive *Younger* rule and that the district court not only had jurisdiction to adjudicate their claims for equitable and declaratory relief on the merits, but also should exercise it.

Of course, we reach these conclusions solely on the basis of plaintiffs' allegations. In the present posture of the case, those allegations are uncontroverted and we think that they require an evidentiary hearing. Until an evidentiary hearing has been held and the facts found, we cannot know them.

It follows that the judgment dismissing Foard and Brown must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

We append two additional comments for the guidance of the district court on remand:

First, it appears from statements contained in affidavits in support of, and in opposition to, a motion for summary reversal that defendant Foard has been succeeded in office by a certain James C. Anders, Esquire. In oral argument, counsel confirmed that Foard is no longer Solicitor for Richland County. A formal substitution of parties has not been requested, and no party has raised any question of the effect, if any, of defendant Foard's leaving office. *See Spomer v. Littleton*, 414 U.S. 514, S.Ct. 685, 38 L.Ed.2d 694 (1974). We do not address the question. It may, however, be raised and decided in the district court on remand.

Second, we would suppose that, if after trial, an injunction to prevent further unlawful interference by the

Solicitor of the County of Richland (if such be proved) is granted, Magistrate Brown, freed from interference from the Solicitor's office, would issue any warrants sought by plaintiffs, which he determined were grounded on probable cause, on his own motion without the necessity of an order by the district court. Because of this likelihood we do not consider the authority of a federal court in order to redress a violation of §1983 to compel performance of a ministerial act by a state judicial officer. *Compare Peek v. Mitchell,* 419 F.2d 575 (6 Cir. 1970), with *McIntire v. Wood,* 7 Cranch, 504, 3 L.Ed. 420 (1813); *Stern v. South Chester Tube Co.,* 390 U.S. 606, 88 S.Ct. 1332, 20 L.Ed.2d 177 (1968); *Haggard v. State of Tennessee,* 421 F.2d 1384 (6 Cir. 1970); *Gurley v. Superior Court of Mecklenburg County,* 411 F.2d 586 (4 Cir. 1969). *See also* Note, Mandatory Injunctions as Substituted for Writs of Mandamus in the Federal District Courts: a Study in Procedural Manipulation, 38 Colum.L.Rev. 903, 904-05 (1938). We do not dismiss Magistrate Brown now, however, because if plaintiffs prove the case they have alleged and our supposition with regard to Brown is unfounded, the district court will be brought to the question we reserve.

Reversed and remanded.

APPENDIX F

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 79-6800

JUDGMENT

MELVIN LEE TIMMERMAN; and, ROBERT THOMAS, individually and on behalf of all other similarly situated,

Appellees,

vs.

WILLIAM LEEKE, in his official capacity as Director of the Department of Corrections of the State of South Carolina; PETER THEM, in his official capacity as Legal Advisor to the Department of Corrections of the State of South Carolina; J. W. STRICKLAND, in his official capacity as the Warden of the Central Correctional Institution of the State of South Carolina; SAMUEL BENJAMIN, WILLIAM WESTON, ROBERT ERVIN, TERRY HART and SAMUEL JACKSON, in their official capacities as Corrections Officers of the State of South Carolina,

Appellants,

and

THE HONORABLE FRANCHOT A. BROWN, in his official capacity as Magistrate for the County of Richland, State of South Carolina; and, JOHN FOARD, in his official capacity as Solicitor for the County of Richland of the State of South Carolina, and their AGENTS, SUBORDINATES, and EMPLOYEES,

Defendants.

APPEAL FROM the United States District Court for the District of South Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ WILLIAM K. SLATE, II
Clerk

APPENDIX G

United States Court of Appeals
FOR THE FOURTH CIRCUIT

No. 79-6800

ORDER

MELVIN LEE TIMMERMAN, et al,

Appellees,

versus

WILLIAM LEEKE, etc., et al,

Appellants.

Upon consideration of the appellants' petition for rehearing and no request for a poll of the court on the petition for rehearing en banc, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Butzner with the concurrence of Judge Field and Judge Murnaghan.

For the Court,

/s/ WILLIAM K. SLATE, II
Clerk